United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

BOTANY WORSTED MILLS,
Libelant, Appellee,

vs.

JAMES KNOTT,
Respondent, Appellant.

HENRY P. WINTER and another,
Libelants, Appellees,

vs.

JAMES KNOTT,
Respondent, Appellant.

BRIEF FOR APPELLANT.

Statement.

These are appeals from decrees for $1,191.54 and for $412.24 entered against the respondent, as owner of the steamship *Portuguese Prince*, in an action brought in the District Court of the United States, for the Southern District of New York, by the owners of wool shipped upon the said steamship, for damage from contact with drainage from sugar.

The wool was shipped at Buenos Ayres for New York, was stowed in the forward part of No. 1 between-decks,

and extended aft to within about ten feet of a temporary wooden partition, which separated No. 1 from No. 2 between-decks (fol. 107). The sugar was shipped at Pernambuco, a port of intermediate call, and was stowed in No. 2 between-decks, the forward part of the sugar being about twenty-five feet aft of the wooden bulkhead (fol. 108). The bulkhead was not tight, and was not intended to be so, but ample means was provided for the escape of the sugar drainage by scuppers in the after part of between-decks No. 2, as well as by scuppers in between-decks No. 1 (fols. 116–120). Both the wool and the sugar were properly stowed and dunnaged (fols. 108–10, 131–2). On leaving Pernambuco, the ship was trimmed by the stern (fol. 100). At Para, the next port of call, discharge of cargo from the after holds altered the trim of the vessel, so as to put her two feet by the head; and she continued two feet by the head until she arrived at Port of Spain, Trinidad, where cargo was loaded into the after hold, which brought her again by the stern (fols. 100, 102, 181–216). In the meantime, in consequence of the vessel's improper trim, drainage from the sugar had run forward and injured the wool (fols. 115–16).

Though the learned District Judge speaks, in his opinion, of "changes in loading" at Para, no cargo was loaded there, nor was there any change in loading, except the discharge of cargo destined for that port (fols. 208–12). It was stipulated between the parties as follows (fols. 167–8):

"There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log, which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool, at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain, none of the drainage from the sugar found its way into the forward 'tween-decks. The Court may draw inferences" (fs. 167–8).

The bills of lading contained clauses of exemption from—

"negligence of master or mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from

them * * * however caused, * * * and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment, of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against unseaworthiness;"

and further provided that the contract should be governed by the law of the flag of the ship carrying the goods (Exhibits B and C). The *Portuguese Prince* was a British ship.

The answers pleaded that the damage was due to a fault or error in navigation or in the management of the vessel, for which the vessel was freed from liability by section three of the Harter Act; they also pleaded the exemptions in the bills of lading from loss by negligence, and that such exemptions are valid by English law.

POINTS.

I.

THE DAMAGE WAS CAUSED BY A FAULT OR ERROR IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL, WITHIN THE MEANING OF THE HARTER ACT, AND THE VESSEL IS CONSEQUENTLY NOT LIABLE.

(*a.*) *The cause of the damage was the negligence of the master in permitting the vessel to take and keep an improper trim.*

There was no negligence in the manner of stowing the wool at Buenos Ayres, or in stowing the sugar at Pernambuco, considered either separately or with reference to each other. So long as the vessel re-

tained her proper trim, no damage could occur, and the master might reasonably have expected her to retain it throughout the voyage. There is no intimation in the evidence or in the opinion of the trial Judge, that when the sugar was stowed at Pernambuco there was ground to expect that the ship would lose her trim, in subsequently discharging, or at any other time; nor that, if a change of trim was threatened, there would not be abundant opportunity to prevent it. There was, therefore, no negligence until, at Para, the ship was permitted to become and to remain by the head. Before that time the stowage of the sugar and wool had been completed.

Therefore there was no fault in the stowage of the cargo. Nor was there fault in the discharge of cargo at Para. It was necessary, and was of course, expected that the cargo consigned to Para should be taken out at that port, and it was taken out, for all that appears, in an entirely proper manner as far as concerns the discharge itself. The change of trim was not a necessary consequence of the discharge, for it could obviously have been avoided by changes in water ballast or by shifting cargo. It was the master's duty, as the trial Judge expressed it, to take care "that no changes of loading should bring the ship down by the head." He failed in that duty, with the result that the ship was put into a condition dangerous to the cargo she had on board.

(*b.*) *The failure properly to regulate the trim was not a fault in stowage.*

It would seem that the learned District Judge was of opinion that since the manner in which the vessel was originally stowed, furnished the reason why she ought not to be allowed to get by the head, the maintenance of her trim in a subsequent *discharge of cargo* (which he called a change in loading), became a part of her stowage, and that a faulty trim related back and partook of the nature of a fault in stowage.

He said (fol. 248) that "the wool should not have been stowed forward of the wet sugar, unless care was taken

in the other loading, and in all subsequent changes in the loading to see that the ship should not get down by the head," and (fol. 249) that "The negligence consisted *in stowing the wool far forward*, without taking care *subsequently* that no changes of loading should bring the ship down by the head."

It can hardly have been intended to intimate that that which was not want of prudence at the time of stowing the wool, could become such afterward by virtue of later occurrences.

On the other hand, if the real negligence occurred at a subsequent period of the voyage, such negligence, it is submitted, cannot be transformed into a lack of care in stowage upon the theory that it was the manner of stowage which made necessary the subsequent preservation of trim. The law distinguishes only between stowage which is proper and stowage which is not proper. If the cargo was originally stowed in a proper manner, that is to say, if as it was originally stowed, there was no reasonable ground to apprehend damage, it can make no difference whether it was stowed in one particular way or in another. The subsequent damage has no legal relation to the method of stowage adopted. In other words, so long as there was no reasonable ground to anticipate a change in the vessel's trim sufficient to damage the cargo, it can make no difference what amount or degree of change in the trim would be necessary to produce damage, nor in what proximity or relation to other cargo the wool was stowed. The case would be the same as if the wool were stowed in a compartment by itself, and could not be damaged unless the ship heeled over far enough to bring water down her hatches. If such a vessel were permitted to capsize while discharging by taking out all the cargo on one side first, it would seem that the Court must say, if consistent, that the stowage was negligent, and that the negligence consisted in stowing the wool in the most suitable place in the vessel without taking care subsequently that the ship should not tip over.

Indeed, if wool in a forward hold were injured by collision, due to a wrong order given to the helm, would not

the same logic prove that to be a fault "in stowing the wool far forward without taking care subsequently" that collision should not occur? The question in both cases must be whether the injury might have been anticipated from the stowage; if not, the fault is not in stowage, but in a subsequent and different lack of care.

(c.) *A negligent alteration of a vessel's trim, though occurring during the discharge of cargo, is a fault of management within the Harter Act.*

It has been argued that the clause of the Harter Act exempting the shipowner for faults in management must receive a restricted construction, so as not to conflict with the more particular provisions of those clauses which forbid the insertion of agreements in bills of lading, relieving (that is, purporting to relieve) shipowners from liability for faults such as negligent stowage and delivery. It is conceived, however, that if there is any conflict, the exemption of faults in management, which is explicit, must prevail over the other clauses which bear on the shipowner's liability only by inference. They do not say what his liability is; they only declare that such liability as he has, he shall not diminish. The third section fixes the liability and is dominant. It declares, in substance, that where the shipowner having taken all care to provide a proper ship and a proper crew, is not personally at fault, he shall not be made responsible for the dereliction in duty of those to whom he has necessarily and properly committed the management and navigation of his vessel. Unless the damage can be fastened on the person whose act has caused it, it must lie where it falls. The other clauses do not cut this provision down. They may give rise to an inference that stowage and loading *in general* are not included within the management of the ship; but nothing more.

For loss arising from mere accident, the act allows the shipowner to relieve himself by agreement as he sees fit. For loss arising from negligence of his agents, the act fixes his liability. It is believed to have been the intent of Congress to absolve the shipowner from liability

for failure of his officers or crew in seamanship; that is to say, for failure to do properly whatever would fall within the scope of their duties as seamen in the course of an ordinary voyage, from the time the cargo was stowed on board until it was ready for delivery at its port of destination. This would include a regulation of the speed and trim of the vessel, as well as the use of any of her appliances in the ordinary course of the voyage. It would, perhaps, not include theft or careless loss of cargo on the voyage, as those are not faults in seamanship.

In *The Glenlochil* (1896), Prob., 10, it became necessary during the discharge of the defendant's cargo at the port of destination to stiffen the ship, and for this purpose water was run into a ballast-tank, and because of the damaged condition of a sounding-pipe and its casing due to heavy weather on the voyage, that part of defendant's cargo still in the hold was damaged, the omission to ascertain the condition of the sounding-pipe being negligence. The bills of lading incorporated by reference the provisions of the Harter Act. It was *held* that the word "management" extended to operations, during discharge at the port of destination as well as at sea, and that the stiffening of the ship by means of the ballast-tank was an act of management.

In *The Ferro* (1893), Prob., 38, where a bill of lading contained an exemption for loss from any act, neglect or default "in the management or navigation of the ship," and it was held that stowage without sufficient dunnage was not within the exemption, Sir FRANCIS JEUNE said at page 45:

"It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the safe management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation for example might be management of the ship, but would have nothing to do with the navigation."

In *The Glenlochil, supra*, the same learned Judge said, at page 16:

"It may be that the illustration I gave in that case (*The Ferro*) as to the removal of the hatches for the sake of ventilation was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel, *indirectly affecting the cargo.*"

In *Dobell & Co.* v. *S. S. Rossmore Co.* (1895), 2 Q. B. 408, A. L. SMITH, *L. J.*, said, at page 47:

"It is not necessary to decide what is the interpretation of the expression 'faults or errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that if the shipowner by himself or his agents uses due diligence to make the ship seaworthy, when she starts, he shall not be liable for what happens afterwards when the ship is at sea, and he has no more control over her."

It seems clear that there may be acts constituting management of the vessel in port as well as at sea, as was decided in the case of *The Glenlochil* (*sup.*), and that for such acts of management as are under the control and form a part of the duty of the officers of the vessel it is the intention of Congress that the owner shall not be liable. The preservation of a vessel's trim is a part of the duty of her master in respect to his care and oversight of the vessel, and constitutes a part of her management.

In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice CURTIS said:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable."

For that reason it was considered that under an allegation of carelessness of the master a cargo owner might show overloading of the vessel.

If the change of trim had been designedly produced by filling ballast tanks, to steady the ship, it is submitted that the appellant would not have been liable for resulting damage to the wool. If so, a negligent omission to steady the ship by means of the ballast tanks would equally have been a fault of management, and the owners would not have been liable for damage to cargo due to the vessel's lack of stability.

For the reasons following, it can make no difference that the omission was to trim the ship *for the benefit of cargo*, or whether she should have been trimmed by using ballast-tanks or by shifting cargo.

(*d.*) *Whether an act or omission constitutes a fault in management depends on the nature of the thing done or omitted, and not on the purpose of the man who does it, or the means he takes to accomplish it.*

The District Judge distinguished the case of *The Glenlochil* (*sup.*) upon the grounds (1) that the act done was primarily for the benefit of the ship and not of the cargo; and (2) that it was done with ship's appliances. It would seem, however, that that case should not and would not have been differently decided if the purpose of filling the tank had been to benefit the cargo by bringing the ship down nearer to the wharf, so as to facilitate the discharge, as in *The Glenmavis*, 69 Fed. Rep., 472. In either case, the primary effect of the act would be upon the ship, and it would affect cargo only through affecting the ship. If a change in the ship designed for the ship's benefit is management of the ship, it must equally be management, though designed for the benefit of the cargo.

It is difficult to see what object the framers of the Harter Act could have had in providing that the owner of a vessel should be liable for the negligent manner in which a master filled a ballast-tank, provided he intended to benefit the cargo by it, and not liable, if he did it intending to benefit the vessel; or what the rule of liability should be if it were intended both to stiffen the vessel and to bring her down in the water, so that cargo could be delivered to the wharf from a lesser elevation.

The whole voyage and everything done in the prosecution of it is for the benefit of the cargo as much as of the ship. As Sir FRANCIS JEUNE said in *The Glenlochil*, at page 15: "In a secondary, though not in a primary sense, any mismanagement of the ship, in navigation or otherwise, is a want of proper care as regards the cargo."

In *The Silvia*, 64 Fed., 607, neglect to close an iron shutter was held a fault in management, although such neglect endangered only certain cargo and not the ship.

If an alteration of the vessel's trim by means of ballast tanks is an act of management, an alteration effected by any other means, or without the use of the ship's appliances, as by shifting cargo, is an act of management, because it relates to the vessel. And a negligent omission to correct an improper trim, is a fault of management equally whether the trim should have been corrected by using ballast tanks or by shifting cargo, or by any other method whatever.

(e.) *The proximate cause of damage was the improper trim of the vessel.*

If the foregoing remarks are well-founded, it is immaterial to the purposes of this case that the reason why the vessel should not have been permitted to get out of trim was the likelihood of damage to cargo, or that her improper trim was not the result of a misuse of ship's appliances. An improper trim being a fault of management, the question really is, whether such fault caused the damage, or whether the damage may be attributed to some other cause.

Here again, for illustration, recourse may be had to the extreme case supposed above of a vessel so lightened by the discharge of cargo at one side as to admit water at the other. It is the improper trim which directly produces the damage. It may be true that the consequences of the faulty trim might have been avoided by a restowage of cargo, but so in *The Silvia*, the consequences of leaving the port open might have been avoided by taking cargo from the compartment. Even if it had appeared in that case that spreading a tarpaulin over the cargo would have kept

it dry, it is believed that the negligence would still have been considered to lie in the omission to close the port, and it would have been held; *first*, that that omission was negligent, because damage to cargo, though not to ship, was likely to result; and *secondly*, that in a legal sense the negligence consisted in that omission alone, since the necessity for spreading the tarpaulin arose only in consequence of it, and lasted only while the omission to close the port continued. So, in the case at bar, the omission to correct the ship's trim was improper, because of the likelihood of damage to cargo; and even if such damage might have been avoided by immediately shifting and restowing the wool before the sugar drainage had a chance to reach it, the damage to the wool is not to be attributed to any incidental, consequent and contemporaneous failure to protect the wool against the sugar drainage, but solely to the improper trim of the ship by which the injury was directly produced.

II.

IF THE LOSS WAS NOT DUE TO A FAULT IN THE MANAGEMENT OF THE SHIP, THEN THE EXEMPTIONS OF LOSS BY STOWAGE, LEAKAGE, &C., EVEN WHEN CAUSED BY NEGLIGENCE, ARE VALID, AND RELIEVE THE VESSEL.

1. *The prohibitions of the Harter Act against the insertion of clauses in bills of lading containing exemptions of negligence, do not apply to a bill of lading issued at a foreign port.*

The provisions of the Harter Act are set forth in an appendix. They are penal, the insertion of a clause in a bill of lading, coupled with the refusal to issue a bill in the form provided for in Section 4, being made a criminal offense, punishable with a fine not exceeding $2,000. They are, therefore, limited in application to the territorial jurisdiction of Congress.

The act must be so construed as to bring it within the

proper powers of Congress, and it must be held to be confined to bills of lading issued at a port of the United States." That it was the intention of Congress so to confine it, is made clear by the language of the act. The third section exempting the owners for faults in navigation or management, applies to "any vessel transporting merchandise or property *to or from* any port of the United States. In Sections 1 and 4, the word "to" is omitted, and the words are, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports." The omission of the word "to," was evidently for the purpose of confining the operation of the penal sections to bills of lading issued in the United States, for foreign ports or for other United States ports. Even if the act were intended to apply to foreign ports, and to make criminal acts done by foreigners there, it would, in so far, be inoperative, as without the powers conferred upon Congress. If Congress could compel a master to issue a bill of lading without a negligence clause, it could compel him to issue a bill without any exceptions in it at all, or which contained an agreement binding the vessel even for the act of God.

2. *No reason appears why the parties are not entitled to have the Court give effect to their intention.*

(*a.*) The contract evidenced by the bills of lading was made at Buenos Ayres, and was to be performed upon a British vessel. The parties have agreed that it shall be governed by British law, and under the British law they are entitled to have full effect given to the agreement which they have made. That the negligence clause is valid by British law, is admitted in the answers to interrogatories which stand as answers in both cases (fols. 49, 50, 96). That the parties intended the stipulation to be binding is clear, and they have a right to the enforcement of their contract unless some reason of public policy appears to the contrary.

(*b.* There is nothing immoral nor contrary to fair dealing in a stipulation which relieves the shipowner from

the consequences, not of his personal negligence, but of the negligence of subordinates, who are necessarily, as a matter of fact, beyond his personal control. There is no attempt to relieve the shipowner, if he has not exercised due care in the selection or supervision of his employees. The effect of the clause is simply to provide that as between the shipowner and the owner of cargo, loss which was not due to the fault and could not have been avoided by the exertions of either, shall not be shifted from one to the other but shall lie where it falls. The agreement was made upon good consideration. The shipowner has performed his part of it. "It is to be assumed that the cargo owner has received a consideration for it in a reduced rate of freight" (The *Wells City*, 61 Fed. Rep., 857). Consequently there would seem to be the strongest reasons of fair dealing and commercial integrity why the stipulation should be enforced. Is there any predominant reason why it should not be enforced?

(c.) It has been held that such a stipulation, if made with reference to American law, within the United States, and intended to be performed here, would not be enforceable, because contrary to public policy. It is, however, also the law that if made in a foreign country, by whose laws the stipulation was valid, it would be enforced here, at least in regard to negligence which occurred in such foreign country (The Trinacria, 42 Fed. Rep., 863; Baetjer *vs.* La Compagnie Generale Transatlantique, 59 Fed. Rep., 789; The Majestic, 60 Fed. Rep., 624-627; Fonseca *vs.* Cunard S. S. Co., 153 Mass., 553).

It would seem, therefore, that the considerations of public policy which under the circumstances before stated prevent the enforcement of the clause in our courts, are not such as would apply to the contracts wherever made or intended to be performed, but are considerations of purely local policy.

Only contracts invalid because immoral or flagrantly unjust are unenforceable here, though treated as valid where made (Oscanyon *vs.* Winchester Arms Co., 103 U. S., 261).

This exception does not apply to contracts merely op-

posed to some local public policy. Thus in *Commonwealth of Kentucky* v. *Bassford*, 6 Hill, 438, it was held that a contract made and to be performed beyond the State of New York in relation to a foreign lottery, if lawful where made, would be enforced in New York, though if made in New York it would be unlawful (see also *Thatcher* v. *Morris*, 11 New York, 438; per Lord Mansfield, *Robinson* v. *Bland*, 2 Burrows, 1077).

The apparent reason for disregarding negligence clauses in domestic contracts is the belief that the social and economic conditions prevailing here are such that the possible encouragement of negligence among employees, by failure to hold their principals to a strict accountability therefor, would produce results worse than a failure by the courts to hold parties to their bargains.

It may well be, that under the different conditions of foreign countries, the same reasons do not apply with sufficient force to produce the same result of public policy. That they do not so apply, and that the public policy of many, if not most, other countries *requires* such stipulations to be upheld, is proved by the view taken of negligence stipulations in the courts and legislatures of those countries, whose views as to the public policy of their own countries must be taken as conclusive. It is well known that the courts not only of Great Britain, but of other countries, have long enforced negligence clauses, and that their legislatures have acquiesced in such enforcement. GREAT BRITAIN: *In re* Missouri S. S. Co., 42 Ch. D., 321; FRANCE: Baetjer vs. La Compagnie Generale Transatlantique, *supra;* ITALY: The Trinacria, *supra;* HOLLAND: The Guildhall, 58 Fed. Rep., 796; GERMANY: The Glenmavis, 69 Fed. Rep., 472.

(*d.*) The Harter Act, which is the latest expression of legislative opinion on the questions of policy involved, does not forbid the enforcement in our courts of negligence stipulations made in foreign countries, and the cases of The Trinacria, The Majestic, and Baetjer vs. La Compagnie Generale Transatlantique, above cited, show that it is not against, but in accordance with our policy to enforce them. Were it otherwise, the courts must have

refused the ship owner the benefit of the exemption for the same reason that it would have done so had the contract been made and the negligence occurred at New York.

Those cases are also authority for the point on which authority seems superfluous, that there is nothing in such an exemption, immoral or inherently unjust.

(e.) In view of the fact that public policy as to the enforcement of the negligence clause varies in different countries, there can be no presumption that its enforcement is against the public policy either of the Argentine Republic, where the contract was made, or of Brazil, where the negligence occurred. The question is one of fact rather than of law. The presumption is that the parties are entitled to have their contract enforced, and in this case no reason appears to the contrary.

Even if it were shown that in the Argentine Republic and in Brazil the clause was invalid, that would not demonstrate its enforcement to be against our policy. The parties have chosen as their standard, not the Argentine or Brazilian law, but the law of England; and it is hard to see that the enforcement of the clause could conflict with our policy any more than it would if it were made, and the negligence occurred, in England. The fact that a stipulation is void as against the public policy in the place where made, does not render it void (*In re Missouri S. S. Co.*, 42 Ch. D., 321).

In that case, a shipment of cattle was made at Boston, Massachusetts, under a contract made in Boston, which excepted loss by negligence of the master or crew. The vessel was negligently stranded in English waters. The exception of negligence in navigation was void, both by the law of Massachusetts and by the Federal law. The Court of Appeals, affirming CHITTY, *J.*, held, that as the law of the United States did not make the exception illegal but only void, in the sense that the Courts there would disregard it, effect would be given it in England.

(*f.*) Whether or not a negligence clause made in a foreign country relieves the owner for damage occurring there, depends on the law in reference to which the contract is made.

In the case of The Montana, 129 U. S., 397, Mr. Justice GRAY (at p. 458), said:

"This review of the principal cases demonstrates that according to the great preponderance if not the uniform concurrence of authority, the general rule that the nature, the obligation and the interpretion of a contract are to be governed by the law of the place where it is made, *unless the parties at the time of making it have some other law in view*, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, *unless the parties, when entering into the contract, manifest a mutual intention that it shall be governed by the law of some other country.*"

In *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553, 557, KNOWLTON, *J.*, said:

"The contract being valid in England where it was made, *and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent* to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void, as against public policy."

See also *Greenwood* v. *Curtis*, 6 Mass., 358; *The Industrie* [1894], Prob. 58; *Forepaugh* v. *D. L. & W. Ry.*, 128 Penn. State, 217, and cases there cited.

KENT, 2 Comm., 444-5, lays down the rule thus:

"The necessary intercourse of mankind requires that the acts of parties valid where made, should be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State."

In *Field's International Code*, which purports simply to codify the law as it is, the rule on this subject is stated (2d Edition, p. 413, Section 603), as follows:

"The law intended by the parties to govern the interpretation of any stipulation of their contract is deemed to be: (1) *The law of any nation named by them for that purpose as a part of their contract;* or (2) If no such law is so named, the law of the place where such stipulation is agreed to be wholly performed; or (3) If no such law or place of performance is specified, the law of the place of making their contract; but in this case a contrary intention may be shown."

The cases cited by Mr. Field support the rule laid down. In *Miller* v. *Heinrick* (4 Campbell, 155), an English court held that a Russian contract for seamen's wages payable monthly "subject to the deductions provided for by the agreement of the Russian Marine" was to be governed in that respect by the law so mentioned. In *Este* v. *Smith* (23 Law Journal Chancery, 705) 18 Beavan, 122, it was stated that English subjects on their marriage may stipulate that their rights shall be regulated by the law of a foreign country; and the courts of England will enforce such a contract. Similar in effect is *Byam* v. *Byam*, 19 Beavan, 58; *Westlake, Private International Law*, Section 371. In *Van Schaick* v. *Edwards*, 2 Johnson's Cases, 367, KENT, *J.*, held that where it was clear the parties had a view to the laws of another State in the execution of the contract, then undoubtedly the contract was to be governed by such foreign law.

The conclusion is, that there is nothing in the public policy of the United States, to prevent the enforcement of a negligence clause in a contract made abroad.

III.

THE DECREES APPEALED FROM SHOULD BE REVERSED WITH COSTS.

New York, April 20, 1897.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for Appellant.

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill).

P. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between parts of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery,* nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel,* her owner or owners, charterers, *agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July,* eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.